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SUPREME COURT

No. 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NELSON A. ROCKEFELLER, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, MALCOLM WILSON, Lieutenant Governor of the State of New York, and ANSLEY BORKOWSKI, Clerk of the Assembly of the Legislature of the State of New York, *Appellants,*

v.

JEROME T. ORANS, THE VILLAGE INDEPENDENT DEMOCRATS, CAROL GREITZER, EDWARD I. KOCH, MARTIN BERGER and LORRAINE RICHMAN, *Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. .....

NELSON A. ROCKEFELLER, Governor of the State of New York, *et al.*,

Appellants,

v.

JEROME T. ORANS, *et al.*,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants, on behalf of the State of New York, appeal from a final judgment of the Court of Appeals of the State of New York entered on April 28, 1965, which held valid under the United States Constitution, Section 2 of Article III of the New York State Constitution. The judgment accordingly declared the New York State Reapportionment Compliance Act (Ch. 976) as amended by Chapters 977, 978, 979 and 981 of the New York Laws of 1964 (hereinafter referred to as the reapportionment Plans) to be in conflict with such provision of the State Constitution. This statement is submitted to show that this Court has jurisdiction of the appeal and that substantial questions are presented under the Constitution of the United States.

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported in 15 N. Y. 2d 339. A copy of the opinion and final judgment ("remittitur") are appended hereto as Appendix A. The opinion of the Supreme Court of the State of New York, County of New York, is reported in 45 Misc. 2d 616.

JURISDICTION

This suit was brought by appellees in the Supreme Court of New York, New York County, to invalidate the reapportionment Plans. The judgment of that court declaring the Plans invalid was affirmed by the New York Court of Appeals on April 14, 1965, and final judgment was entered on April 28, 1965. A Notice of Appeal was filed in the Supreme Court of New York, New York County, on May 5, 1965.

The jurisdiction of this Court is conferred by 28 U. S. C. § 1257(2), since there is drawn in question the validity of a provision of the New York State Constitution under the Fourteenth Amendment to the United States Constitution, and the decision below was in favor of its validity. The following decision sustains the jurisdiction of the Court to review the final judgment in this case: *Maryland Committee for Fair Representation* v. *Tawes,* 377 U. S. 656 (1964).

CONSTITUTIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States and the pertinent provisions of Article III of the Constitution of the State of New York are appended hereto as Appendix B. The New York State Reapportionment Compliance Act (Ch. 976) as amended by Chapters 977, 978, 979 and 981 of the New York Laws of 1964, which is very lengthy, is not included herewith by leave of the Clerk of this Court, but is set forth in Appendix D to

the Jurisdictional Statement in *Lomenzo* v. *WMCA, Inc.*, October Term, 1965, No. 85, filed on April 23, 1965.

QUESTIONS PRESENTED

1. Where the scheme of legislative apportionment contained in the New York Constitution violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, does the provision of that scheme fixing the size of the New York State Assembly at 150 members violate the Constitution of the United States?

2. Where this Court held, in *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633, 654, that:

> "With the size of the Assembly fixed at 150, with a substantial number of Assembly seats distributed to sparsely populated counties without regard to population, and with an additional seat given to counties having 1½ population ratios, the population-variance ratios between the more populous and the less populous counties will continually increase so long as population growth proceeds at a disparate rate in various areas of the State. . . . [W]hen the effect of these provisions, and the statutes implementing them, on the right to vote of those individuals living in the disfavored areas of the State is considered, we conclude that neither the existing scheme nor the forthcoming one [under the 1960 census] can be constitutionally condoned."

did the New York Court of Appeals err in upholding the validity, under the Constitution of the United States, of the provision of the New York Constitution which fixed the size of the New York Assembly at 150 members, and

in declaring that provision operative so as to invalidate stop-gap reapportionment Plans which create an Assembly of more than 150 members?

3. Where this Court in *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633, held that the provisions in the New York State Constitution requiring separate county representation in the State Assembly, and fixing the size of the Assembly at 150 members, could not both coexist under the Equal Protection Clause, did the New York Court of Appeals err in construing that decision as striking down only the provision requiring separate county representation, and as leaving the State Legislature bound by the provision fixing the size of the Assembly, rather than permitting the Legislature, in fashioning stop-gap reapportionment, to determine the extent to which these provisions should yield to the Equal Protection Clause?

STATEMENT

The Legislature of the State of New York, in reapportioning pursuant to Federal court order, was bound to disregard at least one provision of the prior invalid scheme of legislative apportionment in order to comply with the one-man, one-vote requirement laid down by this Court in *Reynolds* v. *Sims*, 377 U. S. 533, and *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633. It accordingly disregarded the provision of the State constitutional apportionment scheme which fixed the size of the Assembly at 150 members. The decision of the New York Court of Appeals which used that provision to invalidate the reapportionment Plans presents important questions as to the proper implementation of reapportionment responsibilities in our Federal system. The constitutionality of that decision is at issue on this appeal.

(a) *Prior Federal Court Proceedings.* Following three years of litigation, this Court on June 15, 1964 held that

the scheme of apportionment embodied in the New York Constitution violated the Equal Protection Clause. *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633.

The United States District Court for the Southern District of New York, on remand from that decision, ordered on July 27, 1964 that the 1964 election be held under the invalidated apportionment scheme, provided that the Legislature should enact a valid reapportionment plan by April 1, 1965 (later extended to May 5, 1965). Governor Rockefeller announced the appointment of a bi-partisan Citizens' Committee on Reapportionment and represented to the District Court under oath that he would reconvene the Legislature in special session to act on the report of this Committee as soon as it should be submitted. Upon receiving the Committee's report on December 1, 1964 Governor Rockefeller promptly convened a special session of the Legislature, which enacted the four reapportionment Plans (Plans A, B, C and D).

The Citizens' Committee in its report recommended that the only way to comply promptly with the District Court's order was by a statutory enactment, since an amendment to the State Constitution would take at least two years and ought prudently to await further determination by this Court as to the proper scope of constitutional reapportionment. The Committee recommended the adoption of a permanent apportionment by way of a State constitutional convention. The reapportionment Plans therefore were to serve as interim measures.

An increase in the number of Assemblymen was recommended to the Legislature by the Citizens' Committee on Reapportionment. It concluded that the Legislature could disregard the 150-member limitation since the *WMCA* decision had proscribed the use of such limitation when combined with separate county representation. The Committee stated, at p. 22:

> "If a departure from the numbers prescribed in the Constitution of 1894 will more reasonably and practically permit a full compliance with the equal population mandate of the Supreme Court in 1964, it should be unassailable at the state level today.
>
> "There is good reason to argue that the present numerical limitations have fallen together with the basic apportionment formulae."

The Citizens' Committee concluded that the provision for separate county representation was more vital to the proper working of State government than the 150-member limitation.

The Legislature, in enacting the reapportionment Plans, accordingly determined to disregard the 150-member limitation in order to continue to the extent possible, in a manner consistent with equal protection requirements, the historic State policy to provide separate county representation in one house of the Legislature.

The reapportionment Plans were challenged in a proceeding brought in the United States District Court for the Southern District of New York. By orders of January 26, 1965 and February 16, 1965 and a decision dated February 1, 1965, the District Court held that one of the Plans (Plan A) fulfills the requirements of the Federal Constitution, but it invalidated the other three (Plans B, C and D) under the Equal Protection Clause of the Fourteenth Amendment. 238 F. Supp. 916. Certain of the defendants in that action filed a Jurisdictional Statement in this Court on April 23, 1965 (October Term, 1965, No. 85), appealing from so much of the District Court's orders as invalidated Plans B, C and D. Plaintiffs and others in that action filed a Joint Jurisdictional Statement on April 26, 1965 (October Term, 1964, No. 1104), appealing from so much of the District Court's orders as upheld Plan A.

A fuller account of the prior Federal court proceedings is contained in the Jurisdictional Statement in *Lomenzo*, v. *WMCA, Inc.*, (October Term, 1965, No. 85), at pp. 4-11, filed on April 23, 1965.

(b) *Proceedings Below.* On January 20, 1965 proceedings were brought in the Supreme Court of the State of New York, New York County, to invalidate the reapportionment Plans. By stipulation the proceedings were limited to a review of Plan A, the Plan upheld by the Federal court, except that the State court was requested to determine any common questions of law applicable to all of the Plans. The court held on March 15, 1965 that the provision of Section 2 of Article III of the New York State Constitution limiting the size of the Assembly to 150 members is still operative, notwithstanding this Court's decision in *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633, invalidating the prior apportionment scheme, of which Section 2 was a part. Accordingly, the State Supreme Court invalidated all of the reapportionment Plans because they established an Assembly of more than 150 members.

On April 14, 1965, on direct appeal, the New York Court of Appeals affirmed the decision of the State Supreme Court. 15 N. Y. 2d 339. The Court of Appeals ruled specifically that the 150-member limitation in the State Constitution did not violate the United States Constitution, was not affected by this Court's decision in *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633, and was therefore binding on the Legislature when it adopted the stop-gap reapportionment Plans.

THE QUESTIONS ARE SUBSTANTIAL

This appeal is taken under 28 U. S. C. § 1257(2) from a final judgment of the highest court of New York,

where there is drawn in question the validity of a provision of the New York Constitution on the ground of its repugnance to the Fourteenth Amendment to the United States Constitution, and where the decision below was in favor of its validity. The Court recently noted probable jurisdiction of, and gave plenary consideration to, an appeal from a State court judgment upholding the validity, under the Equal Protection Clause, of apportionment provisions contained in the Constitution of that State. *Maryland Committee* v. *Tawes,* 374 U. S. 804 (1963), 377 U. S. 656 (1964).

The Federal constitutional question was timely raised in the court of first instance, and was raised again on the appeal to the New York Court of Appeals, which affirmed the decision of the lower court. The Court of Appeals stated the precise question before it to be:

> "are any of the provisions of article III of our State Constitution, in addition to those directly passed on by the Federal courts in the *WMCA* case, in 'unavoidable conflict with the Fourteenth Amendment' (equal protection clause) of the Federal Constitution?" 15 N.Y. 2d at 349.

The ruling on this question was necessary to the decision invalidating the Plans. Thus, there was no independent State ground upon which the decision rested, and this Court's jurisdiction is properly invoked.

The 150-member limitation on the size of the Assembly was an integral part of the prior apportionment scheme invalidated by this Court in the *WMCA* case. The Court there held that the 150-member limitation could not, consistent with the Equal Protection Clause, co-exist with the State constitutional provision for separate county representation in the Assembly. As indicated below, the Court

did not say that only one of these provisions was invalid, or specify which one. Rather it invalidated the scheme that contained them both.

The Court included the 150-member limitation in its description of the gravamen of the complaint. 377 U. S. at 636. The Court referred repeatedly to the 150-member limitation in describing the apportionment formula contained in sections 2, 3, 4 and 5 of Article III. In reaching its decision, the Court expressly condemned the 150-member limitation as part of the invalid prior apportionment scheme, stating:

> *"With the size of the Assembly fixed at 150,* with a substantial number of Assembly seats distributed to sparsely populated counties without regard to population, and with an additional seat given to counties having 1½ population ratios, the population-variance ratios between the more populous and the less populous counties will continually increase so long as population growth proceeds at a disparate rate in various areas of the State. . . . [W]hen the effect of *these provisions,* and the statutes implementing them, on the right to vote of those individuals living in the disfavored areas of the State is considered, we conclude that neither the existing scheme nor the forthcoming one [under the 1960 census] can be constitutionally condoned." 377 U. S. at 654. (Emphasis supplied.)

The Court of Appeals stated that this language was merely a "passing reference" by this Court to the 150-member limitation, and it did not construe this "passing reference" as a holding that the 150-member limitation fell as a part of the prior New York apportionment scheme. The State court, in holding the 150-member provision operative,

stated that this Court never "said or suggested that the 150-member Assembly limitation was unconstitutional or even involved in the Federal constitutional problems solved in the *WMCA* case. . . ." 15 N. Y. 2d at 346.* The State court's ruling thus clearly misconstrued the effect of the *WMCA* decision.**

The State court erroneously concluded that this Court invalidated the prior New York apportionment scheme on the basis of "the complicated formula provided in Sections 3, 4, and 5 of Article III." In fact, this Court explicitly decided the *WMCA* case on the basis of Sections *2* (the 150-member provision), 3, 4 and 5 of Article III. 377 U. S. at 636, 641, 645-647, 654.

This Court clearly held in *WMCA* that under an apportionment scheme that fixed the size of the Assembly at 150

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*Dissenting from the decision of the Court of Appeals, Judge Van Voorhis stated:

"It seems to me to be too clear for argument that an 'Assembly' consisting of 150 members was an inseparable part of the 'scheme of legislative apportionment' which was . . . struck down.

* * *

"This is the formula which the Supreme Court struck down, and the root of the formula is the ratio of apportionment which is the quotient obtained by dividing the citizen inhabitants of the State by 150. The number 150 is, therefore, the heart of the 'scheme of legislative apportionment' which the Supreme Court declared to be unconstitutional. It would be playing fast and loose with the facts to assume that the number of 150 was arrived at independently of the formula in order to fix the numerical membership of the Assembly without regard to how they were to be distributed between up-State and down-State or among the more populous and less populous counties." 15 N. Y. 2d at 356-357.

**The State court likewise misconstrued the decision of the District Court on remand in the *WMCA* case; it attributed to the District Court a holding that the *WMCA* decision did not affect the 150-member provision. *In fact, the plaintiffs in the District Court conceded that the 150-member provision had been invalidated by this Court* and the District Court therefore did not pass on the question of the continuing validity of the 150-member provision. 238 F. Supp. at 921 (S. D. N. Y. 1965).

members, the disparity between urban and rural representation caused by the provision for separate county representation would increase so long as the population growth proceeded at different rates in different areas of the State. It was the express holding of this Court that the 150-member limitation and the provision for separate county representation could not constitutionally co-exist under the Equal Protection Clause. This Court did not, as the State court concluded, strike down the provision for separate county representation and leave standing the restriction on the size of the Assembly. Rather this Court held that the two provisions in combination violated the Equal Protection Clause.

In reaching its decision, the State court twice (15 N. Y. 2d at 346-348) quoted this Court's statement in *Reynolds* v. *Sims*, 377 U. S. at 584, that:

> "state constitutional provisions should be deemed violative of the Federal Constitution only when validly asserted constitutional rights could not otherwise be protected and effectuated. Clearly, courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible."

This Court continued, however, *ibid.*:

> "But it is also quite clear that a state legislative apportionment scheme is no less violative of the Federal Constitution when it is based on state constitutional provisions which have been consistently complied with than when resulting from a noncompliance with state constitutional requirements. When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls."

The Court thus made it clear that when an apportionment scheme, considered in its entirety, violates the Federal Constitution, the scheme is equally invalid whether it happens to be embodied in statute or in State constitutional provisions. The Court did not carve out a special exception for State constitutional schemes, nor did it hold that the anachronistic fragments of such a scheme were entitled to any greater consideration than the fragments of a statutory scheme.

The State court concluded that:

> "The only other justification for excising the 150-member constitutional provision [besides a showing that it was not severable from the prior apportionment scheme] would be a showing that the Supreme Court's mandate for equally populated districts could not be obeyed if the Assembly districts numbered exactly 150." 15 N.Y. 2d at 350.

With respect to another provision of the prior scheme, the State court similarly stated that it should

> "be respected if it be mathematically possible to do so and still obey the 'one man, one vote' basic rule" 15 N.Y. 2d at 351.

Yet clearly the application of such a "mathematically possible" test to determine whether provisions of an invalid scheme remain operative is bound to defeat Legislative efforts at a rational reapportionment which is consistent with legitimate State policies and equal protection requirements. The controlling principle in reapportionment should be the formulation of a cohesive plan rationally designed in light of the current problems and policies of the State, and consistent with the one-man, one-vote principle. It should not be a blind adherence to such remnants of an invalid scheme as might be resurrected by a slide rule.

This Court indicated the appropriate scope of State legislative power to reapportion when it stated in *Maryland Committee* v. *Tawes*, 377 U. S. at 675-676:

> "With the Maryland constitutional provisions relating to legislative apportionment hereby held unconstitutional, the Maryland Legislature presumably has the inherent power to enact at least temporary reapportionment legislation pending adoption of state constitutional provisions relating to legislative apportionment which comport with federal constitutional requirements."

Similarly, in *Roman* v. *Sincock*, 377 U. S. 695, 710-712 (1964), this Court held that regardless of the fact that apportionment has traditionally been considered a constitutional matter in Delaware, the Delaware Legislature might adopt a scheme of reapportionment.

As this Court stated, in *Reynolds* v. *Sims*, 377 U. S. at 586, "legislative reapportionment is primarily a matter for legislative consideration and determination." It would contravene this principle to permit State courts to resurrect incomplete portions of an invalid apportionment scheme—which were originally adopted as a part of, and in light of, the entire scheme—so as to constrict State legislatures in the fulfillment of their reapportionment obligations.

Article III, Section 5 of the New York Constitution requires that every county (except Hamilton) shall be represented in the Assembly by at least one Assemblyman. Separate county representation has traditionally been of great importance to the people of New York State. The county is the basic governmental unit, providing a host of governmental services to its citizens.* The interests of these counties are diverse and distinct and have his-

*These activities include such extensive and important public functions as police protection, prosecution of crime, legal assistance to indigents accused of crime, courts of law, water supply, sewage and

torically been deemed to merit separate representation in the State Legislature.** Accordingly, the Legislature sought in the reapportionment Plans to achieve separate county representation, consistent with the one-man, one-vote principle and the purpose of keeping the Assembly within a manageable size. Resurrection of the 150-member limitation on the Assembly unnecessarily impedes this legitimate State policy and improperly fetters the Legislature in its efforts to reapportion in accordance with the Federal Constitution.

The questions raised by this appeal are of unusual public importance. The reapportionment decisions of the Court have created the necessity for almost all of the States to reapportion their legislatures. It is important that State legislatures know as promptly and authoritatively as possible the limitations governing their reapportionment responsibilities. State and Federal courts likewise are in need of authoritative interpretation, so as to avoid conflicting decisions and further years of confusion and uncertainty, in matters that lie at the core of State government.

Specifically, the State court's invalidation of the New York reapportionment legislation poses vital questions both as to the intent of this Court's *WMCA* decision and the scope of legislative discretion to enact reapportionment legislation in compliance with Federal court orders. It is im-

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drainage facilities, watershed protection, county planning, public health services, hospitals, libraries and museums, community colleges, transportation facilities, public assistance and care, youth and veterans services, housing regulation, conservation, parks and recreation, highways, probation services, civil service, fire training and mutual aid, civil defense and election procedures. The Citizens' Committee on Reapportionment noted in its Report that each of these functions brings the counties into direct contact with the Legislature.

**As this Court recognized in *Reynolds* v. *Sims*, 377 U. S. at 578:

"A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible . . . in designing a legislative apportionment scheme. Valid considerations may underlie such aims."

See also 377 U. S. at 580.

portant to reapportionment everywhere that the Court make clear the extent to which legislatures are to be circumscribed by archaic fragments of prior apportionment schemes when they undertake their difficult reapportionment responsibilities.

The scope of permissible flexibility in devising interim reapportionment measures was indicated by the Court on a prior appeal. The District Court in the *WMCA* case ordered a one-year term for legislators elected in 1964 and 1965, even though Article III of the State Constitution requires two-year terms for legislators, a provision that clearly was not part of the invalidated apportionment scheme. This Court, in summarily affirming the District Court's order, appears to have sanctioned the District Court's right to disregard State constitutional provisions when faced with the need to provide an opportunity to enact a stop-gap plan consistent with equal protection requirements. *Hughes* v. *WMCA, Inc.*, 379 U. S. 694 (1965).

The decisions of this Court and the necessities of rational reapportionment require that State legislatures be permitted to carry out the reapportionment responsibilities conferred by the Federal courts, free of restrictions contained in previously invalidated apportionment schemes. Otherwise years of uncertainty will be inevitable, and reapportionment responsibilities may be thrown on the Federal courts rather than on the legislatures where they properly belong.

Permitting the resurrection of part of an invalid apportionment scheme invites a head-on collision between State and Federal courts. In this case the State court invalidated Plan A on the basis of the 150-member limitation. On May 24, 1965 the District Court, faced with State court invalidation of the only Plan held to comply with the Federal Constitution, ordered that the 1965 election be held under Plan A as a stop-gap measure. On June 28, 1965 a proceeding was commenced in the State Supreme Court,

Albany County, to enjoin the New York Secretary of State from complying with the District Court's order to hold the 1965 election under Plan A. *Glinski* v. *Lomenzo,* Sp. T. Calendar No. 36. Collisions such as these are seriously injurious to our Federal system and paralyzing to the processes of State government.

CONCLUSION

The New York Legislature has implemented orders of the Federal court by enacting reapportionment legislation which complies fully with Federal constitutional requirements, and at the same time carries on rational and important State policies. The New York Court of Appeals erroneously invalidated this legislation on the basis of a provision of the prior apportionment scheme struck down by this Court in the *WMCA* case.

The Court has jurisdiction of this appeal. The questions presented are substantial and of unusual public importance. Probable jurisdiction should be noted and the final judgment below from which this appeal is taken should be reversed.

Respectfully submitted,

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July 2, 1965

Appendices
A and B

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APPENDIX A

Opinion of the Court of Appeals of the State of New York Dated April 14, 1965

In the Matter of

JEROME T. ORANS, Respondent-Appellant.

In the Matter of

VILLAGE INDEPENDENT DEMOCRATS et al., Respondents.

Argued March 30, 1965; decided April 14, 1965.

OPINION PER CHIEF JUDGE DESMOND

Chief Judge DESMOND. These are proceedings brought by citizens pursuant to section 1 of chapter 773 of the Laws of 1911 to review five statutes (L. 1964, chs. 976, 977, 978, 979, 981) enacted at an extraordinary session of the Legislature held in December, 1964, and which set up four separate plans for apportioning and districting the State Senate and Assembly. The petitions list numerous alleged illegalities in various provisions of the challenged 1964 statutes including an assertion that such laws cannot be passed at a special session and an assertion that each of the four plans violates the State Constitution in that each establishes an Assembly of more than 150 members whereas the State Constitution in section 2 of article III says: "The assembly shall consist of one hundred and fifty members."

After a trial at Supreme Court, Special Term, the court in an opinion and order which discussed many other issues posed by the parties declared the five statutes and their four constituent apportionment-districting plans to be unconsti-

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tutional in their entirety but on one ground only, viz., that each plan calls for an Assembly of more than 150 members prescribed by section 2 of article III of the New York State Constitution. The court held that nothing in earlier Federal court decisions hereafter referred to affects or abolishes the command of section 2 of article III of the State Constitution that there be a 150-member Assembly and that the 150-Assemblymen requirement remains valid, subsisting and effective. Other points argued by the parties were treated in the court's opinion and order but the only two real holdings were: first, that it was not illegal for the Legislature to deal with such matters at an extraordinary or special session; and, second, that the numbers of Assemblymen (variously 165, 180, 186 and 174) specified in the four challenged plans, being in excess of 150, conflicted with the Constitution so that the statutes were completely invalid, regardless of other attacks.

These same two questions are before us on these appeals (the appeal of respondent State officers is as to the second holding, petitioner's cross appeal is as to the first). Since the appeal presents only questions as to the constitutional validity of statutes, it comes direct to us and not to the Appellate Division (N. Y. Const., Art. VI, § 3, subd. b, par. [2]; CPLR 5601).

We hold to be in full effect the flat, positive and unmistakable command of the State Constitution that there be 150 members of the State Assembly. Since each of the four plans violates that command, each plan and all five statutes are invalid. It follows, as we shall explain later on in this opinion, that it is up to the Legislature now to enact

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a new districting-apportionment statute. As soon as reasonably possible thereafter, a Constitutional Convention should be called into being.

A brief description of the extensive and complicated litigations which bring us to the present impasse will now be attempted. In March, 1962 (the Tennessee case, *Baker* v. *Carr,* 369 U. S. 186) the United States Supreme Court held that the Federal courts have subject-matter jurisdiction as to a lawsuit brought to assert that a State legislative representation statute denies the right of citizens to equal protection of the laws, and that a qualified voter has standing to maintain such a suit. Such a suit (entitled *W. M. C. A.* v. *Simon*) had been brought in the Federal court to obtain a judgment that New York's apportionment laws violated the Federal Constitution and had been dismissed for nonjusticiability by a three-Judge District Court (202 F. Supp. 741), but the Supreme Court (*W. M. C. A.* v. *Simon,* 370 U. S. 190 [June, 1962]) vacated the dismissal and remanded the case to the District Court for further consideration "in the light of *Baker* v. *Carr*". On remand the three-Judge Federal District Court held that the New York State's then apportionment laws were valid (*W. M. C. A.* v. *Simon,* 208 F. Supp. 368). The decision was appealed and the victory was short-lived. On June 15, 1964 there were handed down the Supreme Court's series of State apportionment decisions, beginning with the master case of *Reynolds* v. *Sims* (377 U. S. 533) and including the *WMCA* case, now entitled *WMCA* v. *Lomenzo* (377 U. S. 633). The Supreme Court applied to New York its rule, announced on the same day in *Reynolds* v. *Sims,* that both houses of a bicameral Legislature must under the Four-

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teenth Amendment's guarantee of equal protection of the laws be apportioned substantially on an equal population basis. Examining the complicated formula provided in sections 3, 4 and 5 of article III of New York's Constitution, and the statistics as to population and vote in the New York State Senate and Assembly districts, the highest court decided that the existing apportionment (under 1950 census figures) is, and any reapportionment applying to the formulae to 1960 census returns would be, so unequal as to Assembly and Senate district populations as not to be constitutionally sustainable, and that the formulae in the State Constitution necessarily resulted in gross disparities, with comparatively less representation for the populous counties and favoritism to the less populous counties. The Supreme Court, therefore, again remanded the *WMCA* case to the District Court for further proceedings consistent with the Supreme Court's opinion in the *WMCA* and *Reynolds* v. *Sims* litigations.

The Supreme Court's second *WMCA* opinion ended with this paragraph: "We find it inappropriate to discuss questions relating to remedies at the present time, beyond what we said in our opinion in *Reynolds*. Since all members of both houses of the New York Legislature will be elected in November 1964, the court below, acting under equitable principles, must now determine whether, because of the imminence of that election and in order to give the New York Legislature an opportunity to fashion a constitutionally valid legislative apportionment plan, it would be desirable to permit the 1964 election of legislators to be conducted pursuant to the existing provisions, or whether under the circumstances the effectuation of appellants' right to a

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properly weighted voice in the election of state legislators should not be delayed beyond the 1964 election. We therefore reverse the decision below and remand the case to the District Court for further proceedings consistent with the views stated here and in our opinion in *Reynolds* v. *Sims.*"

We emphasize at this point that neither the Supreme Court nor the District Court ever said or suggested that the 150-member Assembly limitation was unconstitutional or even involved in the Federal constitutional problems solved in the *WMCA* case, and that, absent such a holding of Federal unconstitutionality, the limitation remains intact. In its opinion in the master case of *Reynolds* v. *Sims* (377 U. S. 533, *supra*), the Supreme Court had said (p. 584): "State constitutional provisions should be deemed violative of the Federal Constitution only when validly asserted constitutional rights could not otherwise be protected and effectuated. Clearly, courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible." More specifically in *Reynolds* v. *Sims* (p. 581, n. 63) the high court wrote this: "Determining the size of its legislative bodies is of course a matter within the discretion of each individual State. Nothing in this opinion should be read as indicating that there are any federal constitutional maximums or minimums on the size of state legislative bodies." True it is that in describing the New York legislative malapportionment the Supreme Court (*WMCA* v. *Lomenzo,* 377 U. S. 633, 654, *supra*) used this language: "With the size of the Assembly fixed at 150, with a substantial number of Assembly seats distributed to sparsely populated counties". Appel-

lants would have us read this as a holding by the Supreme Court that the 150 figure is so much and so integral a part of the total New York apportionment scheme that the numerical fixation for Assembly membership falls with the rest. We do not so construe that passing reference in the court's description of the State plan. Nor did the Federal District Court so read it when (as hereafter described) the *WMCA* case came to it for the third time. The three-Judge court wrote this (238 F. Supp. 916): "In short, as far as the Federal Constitution is concerned, all the provisions of Article III of the State Constitution relied on by plaintiffs are still operative. Moreover, these provisions are limited in their application only to the extent that they are in unavoidable conflict with the decision of the Supreme Court in *WMCA, Inc.* v. *Lomenzo, supra,* or with the July 27, 1964 order of this court. If, as the State suggests, these provisions of Article III are inseparably intertwined with the 'constitutional formulas' condemned by the Supreme Court, so that all must fall together, this would be a consequence of state law rather than federal law", and quoted this from *Reynolds* v. *Sims*: "State constitutional provisions should be deemed violative of the Federal Constitution only when validly asserted constitutional rights could not otherwise be protected and effectuated. Clearly, courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible" (377 U. S., p. 584). Surely this concept permits and requires the preservation of the "150 assemblymen" provisions voted into our State Constitution by the people of this State.

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Summing up as to the impact on New York apportionment of *Reynolds* v. *Sims* and *WMCA* v. *Simon* (*Lomenzo*), we say that the Federal tribunals invalidated New York's legislative apportionment laws because of these factors only: the distribution to underpopulated counties of a large number of Assembly seats without regard to population, plus the ratios provided for Senate seats, both producing the result that neither House was apportioned so as to result in a "one man, one vote" districting.

We return to the *WMCA* case and its third appearance before the Federal District Court. The court directed that the Legislature enact before April 1, 1965 (since extended to May 5, 1965) a valid apportionment scheme. Then followed the New York Legislature's special session of 1964 and its enactments. The several statutes passed by the Legislature at the special session and signed by the Governor (each law amending the one enacted before it and each violating the 150-member Assembly provision) embodied four different plans now called, for convenience and in order of enactment, A, B, C and D. Plan D, passed last and so being the one favored by the Legislature, was taken up first by the Federal District Court when it got the *WMCA* case back before it. None of the four plans were found to violate the canon: "one man, one vote", But plans D, C and B were all invalidated by the District Court on these grounds: plan D is unconstitutional because it used 1962 voter figures instead of population figures and also because it provided for fractional voting by legislators; plan C because of fractional voting provisions; and plan B because it used voter figures instead of population. This left for consideration by the three-Judge court plan A

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which is the one contested in the present suit and which does not offend in either of the ways that B, C and D do but which does violate the 150-member Assembly provision of section 2 of article III of the State Constitution. The Federal District Court declined to pass on any of the remaining objections stated as to plan A in the *WMCA* case, holding in effect that these were for the State courts to pass on. This the Federal District Court emphasized when it wrote in its order of February 16, 1965: "1. Article III of the New York State Constitution is invalid under Amendment XIV of the United States Constitution only to the extent that its provisions are in unavoidable conflict with the decisions of the United States Supreme Court in *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633 (1964) and with the order of this court dated July 27, 1964."

There was left then for the New York State courts in the present proceedings this question: are any of the provisions of article III of our State Constitution, in addition to those directly passed on by the Federal courts in the *WMCA* case, in "unavoidable conflict with the Fourteenth Amendment" (equal protection clause) of the Federal Constitution? More specifically and pointedly the question is: how much of article III necessarily falls? No one doubts that, absent "unavoidable conflict" with Federal constitutional law as expressed in *Reynolds* v. *Sims* and *WMCA* v. *Simon*, our article III as enacted by the people of New York State not only subsists but is controlling on the Legislature in passing any reapportionment redistricting laws.

We have already stated our conclusion that nothing in the Federal (*WMCA*) decisions abolishes the 150-member

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provision of our State Constitution. Therefore, we should consider it our duty to save it as a clearly separate and severable item (see *People ex rel. Alpha Portland Cement Co.* v. *Knapp*, 230 N. Y. 48, 60-63). "Our right to destroy is bounded by the limits of necessity. Our duty is to save unless in saving we pervert." That striking language of Judge CARDOZO's *Alpha Cement* opinion is surely no less applicable to a Constitution than to a simple statute. Of course, if the 150 limitation were an inseparable part of the larger plan, it could not be saved, but there is no real evidence that it was. Each of our State Constitutions including the first (1777) has prescribed the number of Assemblymen. An 1801 New York constitutional amendment fixed Assembly membership at 100 but ordered that such membership be increased by two each year until a total membership of 150 be reached. Such was the origin of the 150 figure which was, however, not actually arrived at until the Constitution of 1894. From the 1821 Constitution until that of 1894 the number of Assembly members had remained at a constant 128. It was the 1894 Constitution which contained for the first time the elaborate and complex formulae which the Supreme Court struck down as calculated to effect, and effecting, discrimination. Isolated floor speeches and committee reports excerpted from the minutes of the 1894 Convention do not prove that the increase to 150 Assemblymen was directly related to anything other than the increase in the State's population or that it was so central to the formulae as to be inseparable from them. The 150-member provision is stated separately and must be treated separately.

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The only other justification for excising the 150-member constitutional provision would be a showing that the Supreme Court's mandate for equally populated districts could not be obeyed if the Assembly districts numbered exactly 150. No such showing is made or can be made. Difficulties there will be as we will mention later in another connection but there is no impossibility.

We could put a period to this opinion at this point but we are aware that an affirmance here produces pressing necessity for new legislation. The court should not refrain from giving such guidance as is appropriate for the enactment of a new apportionment-districting act.

The first of the additional questions to be considered arises from the objection that the 1964 statutes were invalid because passed not at a regular session but at a special session of the Legislature. Special Term in the decision here appealed from ruled that passage of such legislation at a special session was not forbidden. We agree. In article III, sections 4 and 5 do in terms require reapportionment at a "regular session" but in the only decision of this court on the point we said that the reference to a regular session merely fixed the time and did not limit the power of the Legislature (*Matter of Reynolds*, 202 N. Y. 430, 443-444). Also, it is useful to note that the 1953 reapportionment (the most recent except for that of 1964) was voted at a special session. The 1953 apportionment was upheld in *Matter of Richardson* (*Stark*) (307 N. Y. 269) and, since no point was made of its having been passed at a special session, it would appear that counsel and the courts assumed that invalidity did not result from that circumstance.

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What other parts, if any, of sections 3, 4 and 5 of article III remain binding? First taking up section 5, the unconstitutionality found by the United States Supreme Court relates almost entirely to the second paragraph of that section and to the provision in the first paragraph that each county no matter how small shall have an Assembly member. We see no reason why the balance of section 5 should not be obeyed, especially its requirement that Assembly districts be "compact * * * convenient and contiguous", and including so far as possible all the other directions in the fourth paragraph of section 5. Section 3 of article III of the Constitution, insofar as it delimits the Senate districts, is completely void. Of course, also, the apportionment and locating of Senate districts by the 1964 statutes fall with the invalidated Assembly districting in the same 1964 statutes since the Constitution (art. III, § 5) says that the apportionment of Assembly districts and Senate districts must be "by the same law". The third paragraph of section 4 which permits the increase of State Senate districts above 50 is still alive (see *Matter of Fay*, 291 N. Y. 198) except, of course, that it too is subject to the requirement that districts must be substantially equal in population. The long full paragraph at the beginning seems still to be applicable except possibly the prohibitions in its last two sentences which should, however, be respected if it be mathematically possible so to do and still obey the "one man, one vote" basic rule.

The districting outlawed by the United States Supreme Court as well as all former districtings of this State use the county as the basic unit into which both Assembly and

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Senate districts are molded, but it is patent that under the new rules the integrity of all the counties in these respects cannot be complete. This means not only that it will be impossible to give each county at least one full Assembly district but also that the boundaries of districts cannot in all instances be co-terminal with county borders. Also, the fourth paragraph of section 5 of article III giving local legislatures the power to draw Assembly district lines in counties having more than one Assembly district must go by the board, since in some instances part of an Assembly district will have to be in one county and part in another. However, the historic and traditional significance of counties in the districting process should be continued where and as far as possible.

As to the suggestion that we should leave redistricting to the Federal courts, a large part of the answer is in section 1 of article III of the State Constitution which says: "The legislative power of this state shall be vested in the senate and assembly" and in the directives found in sections 4 and 5 of article III. There is no doubt that reapportionment is within the legislative power with the exercise thereof being subject to constitutional regulation and limitation (see *Matter of Sherrill* v. *O'Brien*, 188 N. Y. 185, 195, as confirmed in *People ex rel. Simon* v. *Bradley*, 207 N. Y. 592, 610). In *Reynolds* v. *Sims* (377 U. S. 533, 586, *supra*) the Supreme Court said that "legislative reapportionment is primarily a matter for legislative consideration and determination, and * * * judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do

so." That says two things: that the power to apportion is generally legislative, and, second, that the Federal courts intervene only out of necessity—that is, when a State apportionment has been held federally unconstitutional and the State Legislature has failed to pass a valid apportionment. That must necessarily mean not that the Federal courts are to do the apportioning when the State apportionment violates the Federal Constitution but that the Legislature is under an obligation to reapportion and that the Federal courts move in only as a last resort.

In saving as much as possible of our article III we are not thwarting but carrying out the will of the people of this State. To turn the whole thing over to the Federal courts would be abdication of the State's sovereignty. To say that apportionment must wait until a constitutional amendment be passed would mean that in the considerable intervening time there would be no apportionment law at all in the State. Since the Federal courts have already held that the present legislators came into office last year pursuant to a districting which was constitutionally void, the result might be not only that the State would have no apportionment law at all but that we might have no Legislature since the three-man Federal court has ruled that the present Legislature is only being allowed to sit on condition that *it* promptly pass a new apportionment statute. The courts of this State and especially our court are part of the government of the State and we have our own obligation to do what we can to keep in existence the necessary elements of State government.

An elaborate formula for allocation of Assembly and Senate seats (such as that of 1894) is not an inseparable

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part of our State Constitution. The very first (1777) Constitution fixed the minimum number of Assemblymen, provided that they were to be chosen annually by counties and allocated the number of Assemblymen for each of the 14 then existing counties (art. IV). The same Constitution said that seven years after the end of the Revolutionary War a census should be taken and that, if the 1777 apportionment of Assemblymen was found to be not in proportion to the number of electors in each county, the legislators should make such an apportionment according to the number of electors in each county, and similarly every seven years thereafter. Likewise, in article XII of the 1777 Constitution, four Senate districts were formed each comprising several counties and a certain number of Senators was assigned to each district with similar provisions for reapportioning according to the number of electors every seven years. These were the apportionment provisions of the 1777 Constitution. Similarly, the Constitutions of 1821 and 1846 simply provided for a division of the State into a fixed number of Assembly and Senate districts and an assignment of numbers of members in proportion to the number of electors. Thus, for the first century and more of the State's existence we had in effect a "one man, one vote" policy of apportionment and it was not until 1894 that the Constitution set up the discriminatory formulae now invalidated by the United States Supreme Court.

The Special Term opinion and order listed a number of Assembly and Senate districts as to each of which, so the court thought, there was a prima facie showing of failure to comply with subsisting provisions of article III. The court stated also that issues of fact had been raised as to

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what the court called "the use of the gerrymander" and that these issues of fact would have to be tried if our court were to reverse the main holdings above referred to. Since affirmance by us would completely remove from the statute books the whole of the four 1964 plans and since an entirely new districting statute would be necessary, we think it inappropriate to pass any comment on these statements in the Special Term order and opinion.

The order should be affirmed, without costs.

CONCURRING OPINION PER BERGAN, J.

BERGAN, J. (concurring) The decision at Special Term holding the Assembly may not be enlarged beyond 150 members by legislative enactment must be affirmed. But the limitation of the New York Constitution on legislative power to reapportion districts goes well beyond a mere numerical change in the Assembly districts.

There are other constitutional requirements of equally uncompromising specificity. It is provided, e.g., that each county "shall always be entitled to one member of assembly"; that apportionment of more than one Assembly district within a county shall be by the local legislative body; that no county shall be divided in the formation of a Senate district unless there are two or more Senate districts in the county (N. Y. Const., art. III, §§ 4, 5).

The Legislature owes its existence to the Constitution. All of its powers, and the limitations on its powers, spring from it. No residual power to make structural changes in its own organization or in other branches of the govern-

ment set up by the Constitution is vested in the Legislature. These basic structures may be altered only by the approval of the people (art. XIX, § 1).

The fact that the Federal Government has now declared that the New York Constitution is invalid as in conflict with the United States Constitution in the way it apportions the Legislature does not create a new kind of ultra-constitutional power to establish a different basic pattern of representation. The people of New York retain the sole power to do this, and it has not been vested by them in the Legislature even to meet an emergency created by the Federal decisions.

The view expressed in the opinion in *Reynolds* v. *Sims* (377 U. S. 533, 586) that legislative reapportionment is "primarily" a matter "for legislative consideration and determination" adds nothing affirmative to the State powers distributed and controlled by constitutional language. Nor does the doctrine of construction by which we should save a clearly separate or separable item in a Constitution or a statute (*People ex rel. Alpha Portland Cement Co.* v. *Knapp,* 230 N. Y. 48, 60-63) create a power which is not there.

The theory on which the court now assumes that the Legislature may pass an apportionment statute inconsistent with the Constitution is that those restrictive constitutional portions have been held invalid by the Supreme Court and that this vacuum in some manner vests affirmative power in the Legislature to make different arrangements of apportionment. The assumption runs against the long history and tradition of federalism in the United States.

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To say that New York, one of the States which formed the Federal Government itself, is to derive a power over the reconstruction of its own government from the intimations of the judicial branch of the Federal Government as to what powers its Legislature ought to have is both revolutionary doctrine and a constitutional anachronism.

We must, of course, yield to the weight of Federal power holding portions of our Constitution invalid. But power to establish substitutes in the structure of the New York government rests only in the people of New York by constitutional revision with whatever risk this implies that if the time necessary to revise the Constitution moves too slowly in the judgment of the Federal court that court will affirmatively implement its decision.

If, as this court is now holding, the Legislature cannot increase the number of Assembly districts beyond 150 because the Constitution expressly states this number, it is reasonable to think that it has no power, either, to overrun other constitutional limitations expressed with equal solemnity.

DISSENTING OPINION PER VAN VOORHIS, J.

VAN VOORHIS, J. (dissenting). Executing the mandate of the United States Supreme Court in *WMCA* v. *Lomenzo* (377 U. S. 633), the three-Judge District Court decreed July 27, 1964: "The scheme of legislative apportionment of the State of New York is hereby declared to be unconstitutional and void as being in conflict with the XIV Amendment of the Constitution of the United States".

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It seems to me to be too clear for argument that an "Assembly" consisting of 150 members was an inseparable part of the "scheme of legislative apportionment" which was thus struck down. This scheme of apportionment was established under subdivision 5 of article III of the State Constitution of 1894 by dividing the whole number of citizen inhabitants of the State by the number of members of the Assembly, viz., the number 150 fixed by subdivision 2. The language of subdivision 5 of article III, in the case of the Assembly, as of subdivision 3, for the Senate, demonstrates, even if it had already not been made certain by the Constitutional Convention,* that the number of 150 was selected as a necessary factor in the constitutional formula which was devised to maintain up-State supremacy. The petitioner and the petitioners-respondents would be the last to deny that rural ascendency was uppermost in the minds of the delegates who recommended the State Constitution in 1894, and this is of the essence of what was held to violate the United States Constitution by the Supreme Court in *WMCA* v. *Lomenzo*. It is as certain as can be that an Assembly membership of 150 would not have

*The proponents of the new article III in the 1894 Convention affirmed that the basic purpose of increasing the size of the Assembly from 128 to 150 was to obtain a particular distribution of legislative seats between rural counties and urban centers (see, e.g., Mr. Becker, Revised Record, 1894 Constitutional Convention, Vol. 3, pp. 998, 999; Mr. Root, *ibid.*, p. 1211). Conversely, the opponents noted unequivocally their conclusion that the size chosen for the Houses of the Legislature were part and parcel of an over-all scheme to deprive urban centers of their rightful portion of legislative power (see, e.g., Mr. Bush, Vol. 3, p. 1008; Mr. Osborn, *ibid.*, p. 1038; Mr. Speer, *ibid.*, p. 1091; Mr. W. Sullivan, *ibid.*, 1102, 1103; Mr. Bowers, *ibid.*, pp. 1134, 1137; Mr. Nicoll, Vol. 4, pp. 14, 15).

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been adopted except in conjunction with the ratio for apportionment in accordance with which the Assemblymen were distributed throughout the State. In determining how much of a statute falls in the face of unconstitutionality the rule is that "a provision inherently unobjectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it *and that the legislature intended the provision to stand, in case others included in the act and held bad should fall.*" (*Dorchy* v. *Kansas,* 264 U. S. 286, 290, per BRANDEIS, J. [italics supplied]; *Lynch* v. *United States,* 292 U. S. 571, 586.) The New York State rule is the same as held in the numerous New York decisions cited in McKinney's Consolidated Laws of New York (Book 2, pt. 1, Constitutional Interpretation, § 48, pp. 42-45).

The same principle applies where a State Constitution conflicts with the United States Constitution.

There being 62 counties in the State, and one Assemblyman allocated to each, it was necessary to have enough so that every county in the State could be represented, the number being set at 150 so that there would be enough left over (88, in fact) to save appearances but not so many as to jeopardize up-State control under a formula carefully devised to distribute them so as not to threaten dominance by the smaller counties. This formula was based on a "ratio for apportionment" which was to be "The quotient obtained by dividing the whole number of inhabitants of the state, excluding aliens, by the number of members of assembly" (i.e., the 150 mentioned in § 2), and it was then provided that one member of Assembly should be

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apportioned to every county (including Fulton and Hamilton as one) containing less than the ratio and one-half over, two members to every other county, and the remaining members to the counties having more than two ratios.

This is the formula which the Supreme Court struck down, and the root of the formula is the ratio of apportionment which is the quotient obtained by dividing the citizen inhabitants of the State by 150. The number 150 is, therefore, the heart of the "scheme of legislative apportionment" which the Supreme Court declared to be unconstitutional. It would be playing fast and loose with the facts to assume that the number of 150 was arrived at independently of the formula in order to fix the numerical membership of the Assembly without regard to how they were to be distributed between up-State and down-State or among the more populous and less populous counties. Without the apportionment formula it is clear that the number 150 would not have been prescribed which made possible compliance with the dominant traditional policy of assigning at least one Assemblyman to each county, however small, and apportioning the rest in the areas where control was designed to be located. The 1894 Constitutional Convention has been criticized for accomplishing that result. The argument carries little weight that the convention intended to set the number at 150 in order to focus control in the down-State counties and to deprive many of the rural counties of an Assemblyman, which is the thrust of the decision at Special Term. It could only have been on such an assumption that the decision below was placed, since only on that basis could it be held that the convention and the people

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would have made the size of the Assembly 150 without regard to the manner in which these Assemblymen were to be apportioned, except that the 150 were to be distributed by dividing the "counties into assembly districts as nearly equal in number of inhabitants, excluding aliens, as may be". It attributes an intention to the delegates to the 1894 Constitutional Convention and to the people which is entirely different from and, indeed, opposite to that which they manifestly entertained, to consider that this figure was selected and apportionment made apart from the "ratio for apportionment" which was the key to the whole thing.

The intention to render these portions of the State Constitution inseparable is, of course, to be ascertained from the Constitution and Convention of 1894, but there can be little doubt that the former membership frozen at 128 by the Constitution of 1821 was known to have had the effect of limiting representation of the more populous counties nor, in my mind, is there any doubt that the number of 150 was adopted in 1894 with the same objective (See Ruth C. Silva: Apportionment of the New York Assembly, 31 Fordham L. R. 1-72, esp. pp. 2-13, esp. p. 5).

As late as January of 1965 the plaintiffs in the Federal court, who initiated the attack on New York's "scheme of legislative apportionment", conceded that the Legislature could change the size of the Assembly in order to correct the existing malapportionment. In the "Preliminary Memorandum in Support of Plaintiffs' Motion" filed in the District Court in January, 1965, they stated (pp. 14-15): "During the hearing last July, plaintiffs took the position that the provision governing the size of the Legislature

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was inseparably intertwined with the apportionment provisions which the Supreme Court had invalidated and that the Legislature is therefore free to alter the size of both houses * * *. We adhere to our prior position that a change in the size of the senate and assembly is permissible." This statement was still in the brief which they submitted to Special Term as *amici* in the proceedings under review.

The same rule applies in measuring the reach of the decision in *WMCA* v. *Lomenzo* (*supra*), regardless of whether it be a Federal or State question of law. It is appropriate to observe, however, that regardless of what deferential gestures the Supreme Court or the three-Judge District Court may have made to the State court, the State legislative apportionment formula has been struck down as conflicting with the Federal Constitution, and it is, therefore, a Federal question. Our State Constitution is invalid insofar as it conflicts with the Federal Constitution. It is true, as stated by the three-Judge District Court February 1, 1965, that all must fall together if the 150-member Assembly and other provisions of Article III "are inseparably intertwined with the 'constitutional formulas' condemned by the Supreme Court," but that cannot be a consequence of State law and is necessarily a consequence of Federal law. What the District Court evidently meant was that it may be a matter for the State courts to decide in the first instance how much of article III was stricken by the Supreme Court, and that it is for the States to revise their formulae in whatever manner they decide in conformity with the Supreme Court decision, but this cannot alter the circumstance that the State Constitution is invalid to the

extent that it conflicts with the Constitution of the United States. Whatever invalidity there be in it results from its conflict with the United States Constitution and, as in any other instances where a State statute or constitutional provision is claimed to conflict with the United States Constitution, it presents a Federal question and a Federal question alone whether such a conflict exists and the extent thereof. There cannot be a different law governing reapportionment depending upon whether it is done by the New York State Legislature or, in default thereof, by the Federal courts in compliance with the command that the United States shall guarantee to every State a republican form of government. In either event reapportionment must be accomplished in accordance with law, which means in conformity with the Constitution of the United States and any subsisting provisions of the State Constitution. The extent of the effect of the Federal Constitution, as interpreted by the Supreme Court, cannot present other than a Federal question.

The order appealed from should, in my view, be reversed.

Judges DYE, FULD, BURKE and SCILEPPI concur with Chief Judge DESMOND; Judge BERGAN concurs in result in a separate opinion; Judge VAN VOORHIS dissents and votes to reverse in an opinion.

Order affirmed.

Appendix A

Final Judgment ("Remititur") of the Court of Appeals of the State of New York Entered April 28, 1965

COURT OF APPEALS

State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 14th day of April in the year of our Lord one thousand nine hundred and sixty-five, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, Presiding.
RAYMOND J. CANNON, Clerk.

REMITTITUR ..... April 14, 1965

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Sup. Ct. 65

No. 140.

In the Matter of

the Petition of Jerome T. Orans,
Respondent-Appellant,

to

Review Chapters 976, & ors. of the Laws of 1964, apportioning and Districting the Senate and Assembly of the State of New York,
Nelson A. Rockefeller, Governor & ors., &c.,
Appellants-Respondents.

(and another proceeding).

BE IT REMEMBERED, That on the 30th day of March in the year of our Lord one thousand nine hundred and sixty-five, Nelson A. Rockefeller, Governor, & ors., &c., the appellants-respondents in the first proceeding, and Jerome T. Orans, the respondent-appellant in the first proceeding, and Nelson A. Rockefeller, Governor, & ors., &c., the appellants in the second proceeding, came here unto the Court of Appeals, by Louis J. Lefkowitz, Attorney General, and Justin N. Feldman, attorneys, and filed in the said Court Notices of Appeal and return thereto from the order of the Supreme Court, New York County.

And The Village Independent Democrats, & ors., the respondents in the second proceeding, afterwards appeared in said Court of Appeals by Stanley Sklar, their attorney.

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Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard these causes argued by Mr. Orrin G. Judd, of counsel for the appellants-respondents and appellants, and by Mr. Justin N. Feldman, of counsel for the respondent-appellant, and by Mr. Stanley Geller, of counsel for the respondents, and by Mr. Jack B. Weinstein, of counsel for the amicus curiae Nickerson, and after due deliberation had thereon, did order and adjudge that the order herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/s/ RAYMOND J. CANNON
Clerk of the Court of Appeals
the State of New York.

Appendix A

Final Judgment ("Remittitur") of the Court of Appeals of the State of New York Entered April 28, 1965

COURT OF APPEALS, CLERK'S OFFICE,)
Albany, April 14, 1965.)

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said causes in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL]

/s/ RAYMOND J. CANNON
Clerk.

APPENDIX B

Constitutional Provisions Involved

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice Pres-

ident, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

CONSTITUTION OF THE STATE OF NEW YORK

ARTICLE III—LEGISLATURE

§ 2. [*Number and terms of senators and assemblymen.*]

The senate shall consist of fifty members, except as hereinafter provided. The senators elected in the year one thousand eight hundred and ninety-five shall hold their offices for three years, and their successors shall be chosen

for two years. The assembly shall consist of one hundred and fifty members. The assemblymen elected in the year one thousand nine hundred and thirty-eight, and their successors, shall be chosen for two years. Amended by the people Nov. 2, 1937.

§ 3. [*Senate districts continued.*]

The senate districts described in section three of article three of this constitution as adopted by the people on November sixth, eighteen hundred ninety-four are hereby continued for all of the purposes of future reapportionments of senate districts pursuant to section four of this article. Added on approval by the people on Nov. 6, 1962, eff. Jan. 1, 1963.

§ 4. [*Readjustments and reapportionments; when federal census to control.*]

Except as herein otherwise provided, the federal census taken in the year nineteen hundred thirty and each federal census taken decennially thereafter shall be controlling as to the number of inhabitants in the state or any part thereof for the purposes of the apportionment of members of assembly and readjustment or alteration of senate and assembly districts next occurring, in so far as such census and the tabulation thereof purport to give the information necessary therefor. The legislature, by law, shall provide for the making and tabulation by state authorities of an enumeration of the inhabitants of the entire state to be used for such purposes, instead of a federal census, if the taking of a federal census in any tenth year from the year nineteen hundred thirty be omitted or if the federal census fails to

show the number of aliens or Indians not taxed. If a federal census, though giving the requisite information as to the state at large, fails to give the information as to any civil or territorial divisions which is required to be known for such purposes, the legislature, by law, shall provide for such an enumeration of the inhabitants of such parts of the state only as may be necessary, which shall supersede in part the federal census and be used in connection therewith for such purposes. The legislature, by law, may provide in its discretion for an enumeration by state authorities of the inhabitants of the state, to be used for such purposes, in place of a federal census, when the return of a decennial federal census is delayed so that it is not available at the beginning of the regular session of the legislature in the second year after the year nineteen hundred thirty or after any tenth year therefrom, or if an apportionment of members of assembly and readjustment or alteration of senate districts is not made at or before such a session. At the regular session in the year nineteen hundred thirty-two, and at the first regular session after the year nineteen hundred forty and after each tenth year therefrom the senate districts shall be readjusted or altered, but if, in any decade, counting from and including that which begins with the year nineteen hundred thirty-one, such a readjustment or alteration is not made at the time above prescribed, it shall be made at a subsequent session occurring not later than the sixth year of such decade, meaning not later than nineteen hundred thirty-six, nineteen hundred forty-six, nineteen hundred fifty-six, and so on; provided, however, that if such districts shall have been readjusted or altered by law in either of the years nineteen hundred thirty or nineteen hundred thirty-

one, they shall remain unaltered until the first regular session after the year nineteen hundred forty. Such districts shall be so readjusted or altered that each senate district shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact form as practicable, and shall remain unaltered until the first year of the next decade as above defined, and shall at all times consist of contiguous territory, and no county shall be divided in the formation of a senate district except to make two or more senate districts wholly in such county. No town, except a town having more than a full ratio of apportionment, and no block in a city inclosed by streets or public ways, shall be divided in the formation of senate districts; nor shall any district contain a greater excess in population over an adjoining district in the same county, than the population of a town or block therein adjoining such district. Counties, towns or blocks which, from their location, may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants, excluding aliens.

No county shall have four or more senators unless it shall have a full ratio for each senator. No county shall have more than one-third of all the senators; and no two counties or the territory thereof as now organized, which are adjoining counties, or which are separated only by public waters, shall have more than one-half of all the senators.

The ratio for apportioning senators shall always be obtained by dividing the number of inhabitants, excluding aliens, by fifty, and the senate shall always be composed of fifty members, except that if any county having three

or more senators at the time of any apportionment shall be entitled on such ratio to an additional senator or senators, such additional senator or senators shall be given to such county in addition to the fifty senators, and the whole number of senators shall be increased to that extent.

The senate districts, including the present ones, as existing immediately before the enactment of a law readjusting or altering the senate districts, shall continue to be the senate districts of the state until the expirations of the terms of the senators then in office, except for the purpose of an election of senators for full terms beginning at such expirations, and for the formation of assembly districts. Amended by vote of the people Nov. 3, 1931; amended and approved Nov. 6, 1945, eff. Jan. 1, 1946.

§ 5. [*Apportionment of assemblymen, creation of assembly districts.*]

The members of the assembly shall be chosen by single districts and shall be apportioned by the legislature at each regular session at which the senate districts are readjusted or altered, and by the same law, among the several counties of the state, as nearly as may be according to the number of their respective inhabitants, excluding aliens. Every county heretofore established and separately organized, except the county of Hamilton, shall always be entitled to one member of assembly, and no county shall hereafter be erected unless its population shall entitle it to a member. The county of Hamilton shall elect with the county of Fulton, until the population of the county of Hamilton shall, according to the ratio, entitle it to a member. But the

legislature may abolish the said county of Hamilton and annex the territory thereof to some other county or counties.

The quotient obtained by dividing the whole number of inhabitants of the state, excluding aliens, by the number of members of assembly, shall be the ratio for apportionment, which shall be made as follows: One member of assembly shall be apportioned to every county, including Fulton and Hamilton as one county, containing less than the ratio and one-half over. Two members shall be apportioned to every other county. The remaining members of assembly shall be apportioned to the counties having more than two ratios according to the number of inhabitants, excluding aliens. Members apportioned on remainders shall be apportioned to the counties having the highest remainders in the order thereof respectively. No county shall have more members of assembly than a county having a greater number of inhabitants, excluding aliens.

The assembly districts, including the present ones, as existing immediately before the enactment of a law making an apportionment of members of assembly among the counties, shall continue to be the assembly districts of the state until the expiration of the terms of members then in office, except for the purpose of an election of members of assembly for full terms beginning at such expirations.

In any county entitled to more than one member, the board of supervisors, and in any city embracing an entire county and having no board of supervisors, the common council, or if there be none, the body exercising the powers of a common council, shall assemble at such times as the legislature making an apportionment shall prescribe, and divide such counties into assembly districts as nearly equal

in number of inhabitants, excluding aliens, as may be, of convenient and contiguous territory in as compact form as practicable, each of which shall be wholly within a senate district formed under the same apportionment, equal to the number of members of assembly to which such county shall be entitled, and shall cause to be filed in the office of the secretary of state and of the clerk of such county, a description of such districts, specifying the number of each district and of the inhabitants thereof, excluding aliens, according to the census or enumeration used as the population basis for the formation of such districts; and such apportionment and districts shall remain unaltered until after the next reapportionment of members of assembly, except that the board of supervisors of any county containing a town having more than a ratio of apportionment and one-half over may alter the assembly districts in a senate district containing such town at any time on or before March first, nineteen hundred forty-six. In counties having more than one senate district, the same number of assembly districts shall be put in each senate district, unless the assembly districts cannot be evenly divided among the senate districts of any county, in which case one more assembly district shall be put in the senate district in such county having the largest, or one less assembly district shall be put in the senate district in such county having the smallest number of inhabitants, excluding aliens, as the case may require. No town, except a town having more than a ratio of apportionment and one-half over, and no block in a city inclosed by streets or public ways, shall be divided in the formation of assembly districts, nor shall any districts contain a greater excess in population over an adjoining district in the same senate district, than the population of a town or block therein adjoining such

assembly district. Towns or blocks which, from their location may be included in either of two districts, shall be so placed as to make said districts most nearly equal in number of inhabitants, excluding aliens. Nothing in this section shall prevent the division, at any time, of counties and towns and the erection of new towns by the legislature.

An apportionment by the legislature, or other body, shall be subject to review by the supreme court, at the suit of any citizen, under such reasonable regulations as the legislature may prescribe; and any court before which a cause may be pending involving an apportionment, shall give precedence thereto over all other causes and proceedings, and if said court be not in session it shall convene promptly for the disposition of the same. Amended and approved by the people Nov. 3, 1931; Nov. 6, 1945, eff. Jan. 1, 1946.

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JOHN F. DAVIS, CLERK

No. 319

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NELSON A. ROCKEFELLER, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, MALCOLM WILSON, Lieutenant Governor of the State of New York, and ANSLEY BORKOWSKI, Clerk of the Assembly of the Legislature of the State of New York,

Appellants,

v.

JEROME T. ORANS, THE VILLAGE INDEPENDENT DEMOCRATS, CAROL GREITZER, EDWARD I. KOCH, MARTIN BERGER and LORRAINE RICHMAN,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS

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JEROME T. ORANS, *et al.*,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

Appellee Orans hereby moves, pursuant to Rule 16 of the Revised Rules of this Court, that the appeal herein taken be dismissed on the ground that it does not present a substantial federal question.

Statement

This is an appeal from a judgment of the New York Court of Appeals, entered April 28, 1965 (R. 933-936)*, affirming an order and judgment of the Supreme Court of New York, New York County, entered March 24, 1965

* Numbers preceded by "R." in this motion refer to pages of the Record on Appeal as filed with this Court.

(R. 906-920), holding invalid on state constitutional grounds apportionment legislation enacted at a special session of the New York Legislature held in December, 1964. The decision here appealed from held the legislation invalid because it provided for an Assembly of more than the 150 members established for that body by Article III, Section 2 of the New York Constitution.

The legislation in question (the so-called Reapportionment Compliance Act) consisted of four separate plans of apportionment of the New York Senate and Assembly, commonly referred to as Plans A, B, C and D. Plans A and C were based on citizen population, the traditional standard provided by the New York Constitution, whereas Plans B and D were based on the vote cast in the 1962 gubernatorial election. Plans A and B provided for single member constituencies in both houses, with each member casting one vote. Plans C and D provided for single member constituencies, but a number of members of the Assembly were awarded fractional votes. None of the four plans provided for 150 Assemblymen: Plan A called for 165, Plan B for 180, Plan C for 186, and Plan D for 174.

After enactment of the legislation, the apportionment plans were presented to the Federal District Court for the Southern District of New York. Pending the hearing of various motions with regard to the legislation, this proceeding, confined to questions arising under the State Constitution, was commenced in the State Court. The Federal District Court declined to enjoin this proceeding, although requested to do so, and declined also to rule on any state constitutional questions as to any of the four plans. Confining itself to federal constitutional questions, the Federal Court by orders of January 26 and February 16, 1965, and in an opinion dated February 1, 1965 (238 F. Supp. 916), held Plans B, C and D unconstitutional, but

sustained Plan A. Cross appeals from that decision are pending in this Court. *Lomenzo* v. *WMCA, Inc.*, October Term, 1964, No. 85; *WMCA, Inc.* v. *Lomenzo*, October Term, 1964, No. 1104.

Inasmuch as Plans B, C and D had been held invalid on federal constitutional grounds, the parties to this proceeding stipulated that the hearing in the State Court as to the facts should be confined to Plan A, but that legal questions common to the four plans would be presented and considered. By a decision dated March 15, 1965 (*In re Orans' Petition*, 45 Misc. 2d 616, 257 N. Y. S. 2d 839) and an order and judgment entered March 24, 1965, the State Supreme Court held all four plans invalid for failure to comply with the requirement of Article III, Section 2 of the New York Constitution fixing Assembly membership at 150. The Supreme Court found further, on the documentary evidence presented to it, that the petitioner had made out a *prima facie* case for the invalidity of Plan A on a number of additional grounds under Article III, Sections 4 and 5 of the New York Constitution (printed at pages 30a-36a of the appendices, hereafter cited as "App.", to the Appellants' Jurisdictional Statement). However, in view of its determination as a matter of law that the legislation was invalid for failure to comply with the requirement of a 150-member Assembly, the Court deferred further proceedings on those issues until the need therefor should appear. The Court in its Order and Judgment held that such *prima facie* showing of invalidity had been made

(a) as to 51 of 65 Senate Districts and 83 of 165 Assembly Districts, for failure to achieve sufficiently equal population (Order and Judgment, pars. 5 and 6, R. 913-915)*;

* In *Matter of Dowling*, 219 N. Y. 44 (1916), the apportionment of 1916 was held unconstitutional for violation of this provision.

(b) as to 8 Senate districts and 11 Assembly districts, for violation of the integrity of town boundaries (Order and Judgment, pars. 7 and 8, R. 915, 916)*;

(c) as to 13 Senate districts and 16 Assembly districts, for failure to comply with requirements that districts be compact and composed of contiguous territory, and, in the case of Assembly districts, composed also of convenient territory (Order and Judgment, pars. 9 and 10, R. 917)**;

(d) as to an unspecified number of districts, for failure to respect the integrity of county boundaries beyond any occasion to depart from them by a need to comply with the equal population standards of the Fourteenth Amendment (Order and Judgment, par. 11, R. 918)***; and

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* This provision was applied in *Matter of Tishman* v. *Sprague*, 293 N. Y. 42 (1944), to invalidate an apportionment of Assemblymen in Nassau County.

** In *Matter of Sherrill* v. *O'Brien*, 188 N. Y. 185 (1907), the apportionment of 1906 was held unconstitutional, in part on this ground.

*** This judicial finding, on extensive documentary evidence, stands in clear conflict with the unsupported assertion of the appellants that the legislation in question enlarged the number of Assemblymen from 150 to 165 "to achieve separate county representation, consistent with the one-man, one vote principle and the purpose of keeping the Assembly within a manageable size" (Juris. State. 14).

Moreover, on the mathematics of the question, the appellants' contention is unfounded. The effect of the increase in the number of Assemblymen from 150 to 165 was to reduce the average citizen population per Assemblymen from 108,272 to 98,429. However, since 22 of New York's 62 counties had a 1960 citizen population of less than 50,000, and another nine counties had a population in the range of 50,000 to 70,000, the slight reduction in average population per member resulting from the increase in the number of members had substantially no significance in terms of preserving separate representation for the many sparsely populated counties. The foregoing population data appear at pages 36-37 of the Supplemental Report of the Joint Legislative Committee on Reapportionment, Legis. Doc. (1964) No. 76-A, Respondents' Exhibit C.

(e) as to an unspecified number of districts, for failure to respect state constitutional prohibitions against gerrymandering, which the Court summarized as forbidding "any system of legislative apportionment and districting which is arbitrary and based on personal and political considerations and not on the convenience of the voters or any factor relating to the public interest, and with the purpose of assuring the continuous election of the candidates of one particular party and the control of legislative districts by particular political leaders" (Order and Judgment, par. 12, R. 918, 919)*.

The respondents below (appellants here) appealed from the Order and Judgment of the State Supreme Court directly to the Court of Appeals, which in a decision of April 14, 1965, affirmed the determination of the Supreme Court that the legislation was invalid, but confined its holding to the issue finally determined below, the violation of the requirement of a 150-member Assembly.

The Questions Raised Are Insubstantial

The appellants' contention that the Equal Protection Clause of the Fourteenth Amendment is violated by the provision of the New York Constitution (Article III, Section 2; App. 29a-30a) which requires that the New York Assembly "shall consist of one hundred and fifty members" is plainly frivolous. No particular number of legislators is incapable of being "apportioned on a population basis" (*Reynolds* v. *Sims*, 377 U. S. 533, 568 [1964]),

* The leading authority on this point is *Matter of Richardson*, 307 N. Y. 269 (1954), involving litigation over the 1953 apportionment. The apportionment was sustained by a divided court, but both the majority and the minority agreed that the state constitution proscribed gerrymandering; they disagreed as to whether the plaintiff's evidence was sufficient to show it as a fact.

and, equally clearly, no particular number of legislators is incapable of being apportioned with the grossest discrimination. In short, no particular number of members of a state legislature can be regarded as either required or prohibited, as a matter of the Federal Constitution. This Court has explicitly recognized as much.

> "Determining the size of its legislative bodies is of course a matter within the discretion of each individual State. Nothing in this opinion should be read as indicating that there are any federal constitutional maximums or minimums in the size of state legislative bodies." (*Reynolds* v. *Sims*, *supra* at 581, footnote 63)

Since 1894 the New York Constitution has fixed the number of members of the Assembly at 150.* Both reason and the pronouncement of this Court in *Reynolds* just quoted sustain the correctness of the determination of the New York courts in this case that the 150-member requirement continues as a valid provision of the New York Constitution, in no way in conflict with the Federal Constitution.

What has been said really disposes of the "substantial questions" which the appellants contend are raised on this appeal. The appellants, however, seek to impart a factitious substance to the issue by asserting that this Court in *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633 (1964), held that the New York constitutional requirement of a 150-member Assembly was itself an ingredient of the "scheme of apportionment" there found unconstitutional. The appellants would have it that this Court acted in defiance of the

* As the Court of Appeals noted in its opinion (App. 14a), the New York Constitution since 1777 has contained provisions fixing the number of members of the Assembly. The question has never been left as a matter of legislative discretion.

obvious (that any number of legislators can be fairly apportioned) and in flat contradiction to its clear statement in *Reynolds* (that in recognition of the obvious, there are no federal constitutional maxima or minima as to the numbers of a state legislative body). Little enough needs to be said to show that this aspect of the question presented is wholly unsubstantial.

The appellants rely on one clause in the opinion of this Court as showing that the requirement of a 150-man Assembly is unconstitutional.

> "With the size of the Assembly fixed at 150, with a substantial number of Assembly seats distributed to sparsely populated counties without regard to population * * * the population-variance ratios between the more populous and less populous counties will continually increase so long as population growth proceeds at a disparate rate in various parts of the State." (377 U. S. at 654)

What this Court was considering was the effect of the scheme of apportionment embodied in the New York Constitution. The inquiry was of course pragmatic. What this Court held was that, taking the facts as they were, including the facts of population concentration and certain other conditions affecting the result obtained when the scheme was given effect, one of those conditions being a fixed number of Assemblymen, the result was one which could not be said to constitute an apportionment "on a population basis." This Court no more condemned the fixed number of 150 Assemblymen than it condemned the "disparate rate" of population growth in various parts of New York. To assert otherwise, as the appellants do, is to indulge in word play.

Even if one were to accept *arguendo* the contention of the appellants that this Court's decision in the *WMCA*

case held the 150-member requirement to be a part of the unconstitutional scheme of apportionment, it does not follow that the requirement cannot continue to be respected consistently with the Federal Constitution. Given that this Court's conclusion as to the New York scheme of apportionment was an appraisal of the total effect of the scheme, it is clearly left for the State to determine which elements of its Constitution, under its own rules of severability, may continue to be given effect, provided only that the result is not inconsistent with the Federal Constitution. Whether individual elements of the scheme, shorn of their association with other elements, may continue to be given effect as a matter of state law would present a federal constitutional question only if the new result were an apportionment inconsistent with the Fourteenth Amendment standard enunciated by this Court. Inasmuch as an Assembly of 150 members can clearly be apportioned on a basis consistent with the command of the Equal Protection Clause, it is a question of state law, not a federal question, as to whether that requirement continues to be applicable.

Acceptance of appellants' contrary contention (Juris. State. 12) would mock the views of this Court expressed in several of the apportionment decisions. Thus, in *Reynolds, supra* at 584, this Court said that "Clearly, courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible." Thus, in the same opinion this Court held clearly proper state efforts to "maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme" (*Ibid.*, at 578). These and other expressions of similar purport have no meaning

if, as the appellants contend, a state legislature is freed by federal constitutional requirements from the applicability of any state constitutional provisions as to apportionment.

The appellants, lastly, raise in rather opaque form what appears to be the contention that the Federal Constitution prohibits judicial review in the New York State Courts of any legislation which the New York Legislature may adopt in a supposed attempt to deal with the situation produced by a determination that an existing scheme of state apportionment is unconstitutional (Juris. State 13 and following)*. The appellants seize on passages in opinions of this Court which describe "legislative reapportionment [as] primarily a matter for legislative consideration and determination," (Juris. State. at 13, quoting from *Reynolds* v. *Sims, supra* at 586), and, in the Maryland case, suggesting that "the Maryland Legislature presumably has the inherent power to enact at least temporary reapportionment legislation pending adoption of state constitutional provisions which comport with federal constitutional requirements" (*Ibid,* quoting from *Maryland Committee* v. *Tawes,* 377 U. S. 656, at 675-76).

Nothing done in New York is in conflict with these comments. Apportionment is "primarily" a legislative matter in New York (see Article III, Section 4 of the New York

* The appellants, indeed, appear to claim that the *Legislature* would have been free to enact a new apportionment providing for the same 150 Assemblymen which they condemn when imposed by the *State Courts*. This appears not only from the appellants' contentions of legislative supremacy in the apportionment process, but also from their necessary contention that no provision of the Federal Constitution precluded the choice of 165 (or 174, 180 or 186) members of the Assembly, as the plans variously provided. It can hardly be supposed that the appellants seriously press an argument that any number other than 150 would be unquestionably permissible, and that only 150 has been condemned by this Court's decision in *WMCA* v. *Lomenzo, supra.*

Constitution, App. 30a-32a, providing for legislative reapportionment decennially). The New York Court of Appeals in this very case, over the thoughtful dissent on this point of Judge Bergan, held that the legislature had the power to enact temporary apportionment legislation (App. 10a and following; Judge Bergan's opinion is printed at App. 15a-17a). What the New York courts declined to recognize as valid was not legislative power to deal with apportionment on a temporary basis, but an exercise of that power in terms flatly inconsistent with provisions of the New York Constitution which in no way conflict with the Federal Constitution.

The question which the appellants raise is the question of which organ of the state government possesses the ultimate power of decision as to whether these state constitutional provisions continue to be applicable. However, this is not a question involving the Federal Constitution, but a question of the allocation of power among the branches of the state government. Article III, Section 5 of the New York Constitution (App. 36a), the validity of which is not in question, confers upon the New York courts the power to review apportionment legislation, and of necessity therefore confers upon them the power to construe the State's constitutional apportionment provisions. Whether this grant of power to the New York courts is wise or unwise, efficient or inefficient or otherwise subject to criticism or applause, is not a federal question and certainly not a substantial federal question.

CONCLUSION

The appeal should be dismissed for want of any substantial federal question.

Respectfully submitted,

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July 30, 1965

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OCTOBER TERM, 1965.

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

No. 319

NELSON A. ROCKEFELLER, Governor of the State of New York, *et al.*,

Appellants,

v.

JEROME T. ORANS, *et al.*,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

Appellee Orans moves the Court to dismiss the appeal on the ground that it presents no substantial Federal question.

As demonstrated in our Jurisdictional Statement, the decision of the New York Court of Appeals clearly presents substantial Federal questions. The decision rests squarely on the determination of a Federal constitutional question, based on an interpretation of a decision of this Court, and the Court of Appeals itself so stated. The State

Court of Appeals held that the provision of the New York Constitution (Article III, Section 2) fixing the size of the Assembly at 150 members continued in full force and effect under the Fourteenth Amendment and this Court's decision in *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633 (1964). The State Court of Appeals itself stated the question before it to be:

> "are any of the provisions of article III of our State Constitution, in addtion to those directly passed on by the Federal courts in the *WMCA* case, in 'unavoidable conflict with the Fourteenth Amendment' (equal protection clause) of the Federal Constitution?" Jurisdictional Statement, Appendix A, p. 8a.[1]

1. Appellee's motion asserts (p. 5) that an Assembly of 150 members can be apportioned in compliance with the Equal Protection Clause, and that a contrary assertion is "frivolous". Whether or not such a contention would be frivolous is beside the point since it is not at issue on this appeal. We have not contended, as Appellee suggests, that 150 Assemblymen cannot be constitutionally apportioned. What we have contended is that this Court's *WMCA* decision invalidated New York's prior apportionment

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[1]Appellee's motion (p. 3) asserts that the decision of the New York Supreme Court (*In the Matter of Orans*, 45 Misc. 2d 616, 257 N. Y. S. 2d 839), which was affirmed by the judgment of the New York Court of Appeals here on appeal, "found" or "held" that a *prima facie* showing of invalidity had been made with respect to certain provisions of the New York reapportionment plans other than the size of the Assembly. All that the New York Supreme Court said as to certain of these provisions was that an issue of fact was presented. Moreover, the Court of Appeals stated that these matters were "treated in the court's opinion" but were not "real holdings" by the New York Supreme Court (Jurisdictional Statement, Appendix A, p. 2a). In any event, the decision of the New York Court of Appeals here on appeal was expressly confined to the validity of the 150-member requirement, and other matters discussed in the opinion of the New York Supreme Court are in no way involved here.

scheme, which included the 150-member provision. This Court held in *WMCA* that New York's apportionment scheme, which provided for both separate county representation and the limitation on the size of the assembly, could not, given the population pattern in New York, result in a constitutional apportionment. The Court found this scheme, including the 150-member Assembly provision, to be violative of the Fourteenth Amendment.

The involvement of the 150-member Assembly provision in this Court's holding of unconstitutionality is clear. The Court in *WMCA* expressly pointed out that the defect in New York's prior apportionment scheme was that it combined a limitation on the size of the Assembly with a provision for separate county representation. The Court stated:

> "*With the size of the Assembly fixed at 150,* with a substantial number of Assembly seats distributed to sparsely populated counties without regard to population, and with an additional seat given to counties having 1½ population ratios, the population-variance ratios between the more populous and the less populous counties will continually increase so long as population growth proceeds at a disparate rate in various areas of the State. . . . [W]hen the effect of *these provisions,* and the statutes implementing them, on the right to vote of those individuals living in the disfavored areas of the State is considered, we conclude that neither the existing scheme nor the forthcoming one [apportionment under the 1960 census] can be constitutionally condoned." 377 U. S. at 654. (Emphasis supplied.)

Appellee's motion does not come to grips with this clear holding in *WMCA*. The motion, referring to this quotation from the Court's opinion, states: "What this Court

was considering was the *effect* of the scheme of apportionment embodied in the New York Constitution" (emphasis supplied). This is precisely the argument unsuccessfully advanced by Appellants to the New York Court of Appeals. Appellants there argued that *WMCA* invalidated the prior apportionment scheme in its entirety, because of the effect, ***in combination,*** of the provisions for separate county representation and a 150-member Assembly. Yet this argument, which Appellee now appears to concede, was rejected by the Court of Appeals. The Court of Appeals instead interpreted this Court's *WMCA* decision as striking down *only* the provision of the apportionment scheme providing for separate county representation, and as not affecting the continuing validity of the 150-member provision. Jurisdictional Statement, Appendix A, p. 7a.

Appellee's motion asserts (p. 7) that: "This Court no more condemned the fixed number of 150 Assemblymen than it condemned the 'disparate rate' of population growth in various parts of New York." It is equally true that the Court no more condemned the provision for separate county representation in the State Constitution than it condemned the provision fixing the size of the Assembly. Just as 150 Assemblymen can be constitutionally apportioned, separate county representation can be achieved in compliance with the Equal Protection Clause by means of fractional voting. This is what the New York Legislature sought to do in certain of the reapportionment plans enacted subsequent to the *WMCA* decision. The validity of fractional voting in the New York reapportionment plans is now on appeal to this Court. *Lomenzo* v. *WMCA,* October Term, 1965, No. 85.

2. Appellee asserts (pp. 7-8) that even if the *WMCA* decision did hold the 150-member requirement to be a part of the unconstitutional apportionment scheme, it is never-

theless a matter for State law, rather than a Federal question, as to whether that requirement continues in force. It appears to be Appellee's position that even if the New York Court of Appeals misconstrued the holding of this Court in *WMCA,* no Federal question is presented because of the possibility that the State court might reach the same result in the application of State rules of severability, i.e., that it might hold as a matter of State law that the State constitutional provision as to separate county representation must yield to the provision as to the size of the Assembly.[2]

Appellee's argument misconceives the principles governing this Court's review of State court decisions. So long as the State court erroneously interpreted the decision of this Court in *WMCA,* which interpretation was dispositive in the decision of the State court, a Federal question is clearly presented, irrespective of what the State court might or might not do under State law in the event its error is corrected. A correction by this Court of the State court's erroneous determination of a Federal question is a necessary preliminary to any application of State law by the State court.

This Court has made it clear that where a State court bases its decision on Federal grounds the appellate jurisdiction of this Court is not eliminated by the possibility that the

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[2]The suggestion that the New York Court of Appeals might reach the same result in the application of State principles of severability has little rational basis. Counties are peculiarly important in New York as political and governmental units, and separate county representation is an historic State policy (see Jurisdictional Statement in *Lomenzo* v. *WMCA,* October Term, 1965, No. 85 at 15-17). The size of the Assembly, on the other hand, has little independent significance. Moreover, the Court of Appeals regarded the State law issue to be that of severability on the erroneous assumption that only the separate county representation provision had been invalidated by this Court. Had the Court of Appeals correctly interpreted the *WMCA* decision, a different State law issue might have been presented.

State court might reach the same result through the application of State law once it is disabused of its erroneous interpretation of Federal law. *E.g. Standard Oil Co. of California* v. *Johnson,* 316 U. S. 481 (1942); *State Tax Commission* v. *Van Cott,* 306 U. S. 511 (1939).

3. Finally, Appellee's motion mistakenly asserts (p. 9) that we contend "that the Federal Constitution prohibits judicial review in the New York State Court of any legislation . . . to deal with the situation produced by a determination that an existing scheme of state apportionment is unconstitutional." We, of course, take no such position. On the contrary, the Jurisdictional Statement makes evident that there is nothing improper in State court review of reapportionment legislation. The point there made relates solely to the *standard* which State courts may properly apply in judging legislation enacted to comply with Federal court orders. It would improperly impede compliance with Federal court reapportionment orders if, as here, State courts were permitted to resurrect remnants of an invalid apportionment scheme in order to strike down the action of state legislatures in the fulfillment of their reapportionment obligations. Rational reapportionment requires that State legislatures be permitted to carry out responsibilities defined by the Federal courts, free of restrictions contained in previously invalidated apportionment schemes.[3] This is especially true where, as here, the legislation involved is a stop-gap reapportionment designed to remedy malapportionment on a temporary basis until a permanent plan can be adopted by State constitutional amendment.

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[3]The Jurisdictional Statement (pp. 15-16) notes that if State courts were permitted to use remnants of invalidated apportionment schemes to strike down reapportionment legislation enacted in compliance with Federal court orders, a head-on collision between State and Federal courts would be invited. Just such a collision occurred here. In the present case the State court invalidated Plan A of the

CONCLUSION

The decision of the New York Court of Appeals was squarely and expressly based on the determination of a substantial Federal question.

Probable jurisdiction should be noted.

Respectfully submitted,

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New York Reapportionment Compliance Act as violating the 150-member limitation on the size of the Assembly. On May 24, 1965 the District Court, faced with State court invalidation of the only Plan held to comply with the Federal Constitution, ordered that a 1965 election be held under Plan A as a stop-gap measure. Subsequent to the filing of our Jurisdictional Statement, the New York Court of Appeals, in an order dated July 9, 1965, enjoined the holding of a 1965 election on the basis of Plan A. A direct confrontation between State and Federal courts was thus presented. On July 13, 1965 the District Court enjoined all persons "from interfering with the carrying out and execution by any and all New York State officers of the order of this Court dated May 24, 1965." A stay of the District Court's May 24, 1965 order was denied by this Court on June 1, 1965. A stay of the District Court's July 13, 1965 order was denied by Mr. Justice Harlan on July 16, 1965.

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No. 319

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OCTOBER TERM, 1965

NELSON A. ROCKEFELLER, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, MALCOLM WILSON, Lieutenant Governor of the State of New York, and ANSLEY BORKOWSKI, Clerk of the Assembly of the Legislature of the State of New York, *Appellants,*

v.

JEROME T. ORANS, THE VILLAGE INDEPENDENT DEMOCRATS, CAROL GREITZER, EDWARD I. KOCH, MARTIN BERGER and LORRAINE RICHMAN, *Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR REHEARING

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Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR REHEARING

Appellants pray that this Court grant rehearing of its decision of October 11, 1965 dismissing the above-captioned appeal, 86 Sup. Ct. 75, and that probable jurisdiction be noted and the judgment from which the appeal is taken be reversed, as set forth in the Jurisdictional Statement filed July 3, 1965 herein.

REASONS FOR GRANTING REHEARING AND NOTING PROBABLE JURISDICTION

The New York Constitution of 1894, which provided the scheme of State legislative apportionment prior to *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633, provided, *inter alia:*

(a) ". . . The assembly shall consist of one hundred and fifty members. . . ." (Article III, § 2); and

(b) "... Every county heretofore established and separately organized, except the County of Hamilton, shall always be entitled to one member of assembly, and no county shall hereafter be erected unless its population shall entitle it to a member...." (Article III, § 5).

This Court held in *WMCA, Inc.* v. *Lomenzo,* 377 U. S. 633, that the apportionment scheme which included these two provisions did not and could not meet the requirements of the Fourteenth Amendment to the Federal Constitution under the one-man, one-vote principal enunciated in *Reynolds* v. *Sims,* 377 U. S. 533.

Quite plainly the 150-member requirement by itself does not violate the Fourteenth Amendment. But if the Assembly is limited to 150 members, it is mathematically impossible for any apportionment scheme to comply with both the requirement of separate county representation and the one-man, one-vote requirement.*

Quite plainly, also, the requirement of separate county representation by itself does not violate the Fourteenth Amendment. But if each county receives at least one Assemblyman, it is likewise mathematically impossible for any apportionment scheme to comply with both the 150-member requirement and the one-man, one-vote requirement.*

Faced with these competing impossibilities, and believing itself free of either of these requirements of the invalid apportionment scheme, the Legislature adopted four alternative reapportionment plans, none of which complies precisely with the 150-member requirement, and two of which do not comply with the separate county representation requirement. The appellees in this case chose to attack the

*See Appendix hereto for an analysis supporting these conclusions.

plans in the State courts for failing to comply with the 150-member requirement. The New York Court of Appeals upheld them, and we appealed to this Court.

By the logic of its decision the New York Court of Appeals would have been equally obliged to decide for the petitioners if they had chosen instead to attack two of the plans for failure to comply with the separate county representation requirement.

This Court, in *WMCA, Inc.* v. *Lomenzo*, 377 U. S. 633, did not state that either the 150-member requirement or the separate county representation requirement, by itself, was unconstitutional; it merely held that the two requirements in combination were bound to produce an unconstitional result. The New York Court of Appeals, however, concluded that this Court had invalidated the separate county representation requirement but not the 150-member requirement. It based this erroneous conclusion upon its finding that the 150-member requirement was not "directly passed on" by this Court but was merely referred to in a "passing reference." *Matter of Orans,* 15 N. Y. 2d 339, 346-349 (1965). This, however, is not accurate. This Court both considered and directly passed on the 150-member requirement. 377 U. S. at 636, 638, 641, 645-647, 654. The Court of Appeals' decision thus rests not upon an interpretation of State law, but upon an erroneous reading of this Court's decision in the *WMCA* case. That court might as easily have said that this Court invalidated the 150-member requirement and made only a "passing reference" to the separate county representation requirement.

The Court of Appeals went on to hold, 15 N. Y. 2d at 350, that:

> "The only other justification for excising the 150-member constitutional provision would be a showing that the Supreme Court's mandate for

> equally populated districts could not be obeyed if the Assembly districts numbered exactly 150. No such showing is made or can be made. Difficulties there will be . . . but there is no impossibility."

It is equally true, of course, that if the 150-member requirement is considered invalid, "there is no impossibility" about complying with the requirement of separate county representation.

This Court dismissed the present appeal on October 11, 1965, 86 Sup. Ct. 75. It stated, *per curiam,* that the State court decision had been partially superseded by subsequent Federal District Court decisions with respect to the 1965 election. With this portion of the Court's decision we agree. The Court further stated: "In all other respects, the appeal is dismissed for want of a substantial federal question." As to this portion of the Court's decision we respectfully petition for rehearing.

While the special legislative election ordered by the District Court for 1965 has already been held, the Assemblymen thus elected will serve for only one year. See Order of the District Court of July 27, 1964, Jurisdictional Statement in *WMCA, Inc.* v. *Lomenzo,* October Term, 1965, No. 81, at pages B-1—B-3. Thus a new apportionment statute is needed for the regular 1966 legislative election, and quite possibly for additional elections before the New York Constitution can be amended to supersede the apportionment scheme which it now contains.

Concurring in this Court's decision of October 11, 1965 in *WMCA, Inc.* v. *Lomenzo,* 86 Sup. Ct. 24, 26, Mr. Justice Harlan stated, in part:

> "In now dismissing for lack of a substantial federal question [this] appeal . . . insofar as it may bear upon any apportionment plan effective after the expiration of the 1966 New York Legislature, I take

> it that the Court is asserting that any final apportionment plan must comport with state as well as federal constitutional requirements. . . ."*

We so read the Court's decision, and we do not see how the State courts can read it otherwise.

Until such time as the State Constitution can be amended, a process which takes at least two years,** the Legislature cannot possibly comply with both the State Constitution and the one-man, one-vote requirement. It must violate either the separate county representation requirement or the 150-member requirement, or, in the interest of achieving the best practical compromise, both. Yet, by dismissing the present appeal, the Court has, in effect, given its imprimatur to the invalidation by the State courts of any reapportionment that violates either of these State constitutional requirements.

It is true that by affirming the decisions of the District Court in *WMCA, Inc.* v. *Lomenzo,* 86 Sup. Ct. 24, *Travia*

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*Mr. Justice Harlan added in a footnote that "The Court's dismissal of this part of the appeal in 86 S. Ct. 75 [i.e., the present case] necessarily approves the Court of Appeals' holding that from the standpoint of federal law the 150-member requirement of the New York Constitution was not an integral part of the apportionment scheme invalidated in *WMCA, Inc.* v. *Lomenzo,* 377 U. S. 633. . . ." We submit with deference, however, that as a matter of logical necessity both the 150-member requirement and the separate county representation requirement were integral parts of the prior scheme. When a scheme is comprised of two parts each of which is less than the whole, it is impossible for only one of the parts to be integral. In recognition of this fact, this Court held, in *WMCA, Inc.* v. *Lomenzo,* 377 U. S. at 654, that:

> *"With the size of the Assembly fixed at 150,* with a substantial number of Assembly seats distributed to sparsely populated counties without regard to population [i.e., separate county representation], and with an additional seat given to counties having 1½ population ratios, . . . we conclude that neither the existing scheme nor the forthcoming one [under the 1960 census] can be constitutionally condoned." (Emphasis supplied.)

**New York Constitution, Article XIX.

v. Lomenzo, 86 Sup. Ct. 49, and *Screvane* v. *Lomenzo,* 86 Sup. Ct. 90, the Court has upheld the power of the District Court to override State constitutional requirements at least for the purpose of effectuating a temporary reapportionment applicable to the 1965 election. Presumably it is still open to the State to seek similar dispensations from the Federal courts with respect to the apportionment for further elections until the State Constitution can be amended. In fact, this seems to be what the State must do if the Court does not reconsider its dismissal of the present appeal, because of the fact that it is mathematically impossible for any apportionment under the one-man, one-vote rule to comply with the present State Constitution.

Such emergency recourse to the Federal courts does not constitute a desirable solution to the Legislature's quandary. (1) It unnecessarily and unduly constricts the Legislature in its task of reapportionment by forcing it to cleave as closely as possible to the components of the prior scheme regardless of what is now in the best interests of the State. (2) It debases acts of the Legislature by making these acts unavoidably in conflict with the State Constitution, and perhaps by making them unlawful unless and until they are rescued by a Federal court order. (3) It thus risks further head-on clashes between the State Constitution and courts on the one hand, and the Federal courts on the other.

Such clashes took place this Spring and Summer in New York, with unfortunate repercussions for our Federal system. Further clashes appear inevitable unless this Court declares once and for all that State courts cannot resurrect fragments of an invalid apportionment scheme, even when the fragment in question does not, in and of itself, offend the Federal Constitution. Under the Court's present ruling, any reapportionment that the Legislature devises must contravene one or another of such fragments.

We respectfully submit that the New York Court of Appeals has misread this Court's decision in *WMCA, Inc.* v. *Lomenzo,* 377 U. S. 633, that by so doing, it has created a problem of serious dimensions for the New York Legislature, and that unless this Court reconsiders its dismissal of the present appeal, the problem thus created seems certain to have a disruptive effect upon future State legislative elections.

CONCLUSION

For the foregoing reasons a rehearing should be granted, probable jurisdiction should be noted, and the judgment below should be reversed.

Respectfully submitted,

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November 5, 1965

CERTIFICATE OF GOOD FAITH

I HEREBY CERTIFY that this Petition for Rehearing is presented in good faith and not for delay.

.....

THOMAS E. DEWEY
Attorney for Appellants

APPENDIX

The 1960 citizen population of New York State was 16,240,786. Of the 62 counties of New York, 39 have a population of less than 100,000; 33 of these have a population of less than 75,000; 22 have a population of less than 50,000; and 5 have a population of less than 25,000. Applying the principle of one-man, one-vote, (a) an Assembly of 150 members (in which the apportionment ratio would be 108,272) would deprive at least half of the counties in New York of separate representation in the Assembly (see Supplemental Report of the Joint Legislative Committee on Reapportionment,* pages 8-15, 19-23); and (b) an Assembly in which each county received separate representation by at least one Assemblyman would require an Assembly of 1,142 members (Report of the Citizens' Committee on Reapportionment,* page 32). The population-variance ratio between the most populous and the least populous Assembly districts would necessarily be about 12.7 to 1 unless *either* of these requirements is eliminated (Report of the Joint Legislative Committee on Reapportionment,* page 6). Thus, it is mathematically impossible for any apportionment scheme in New York to comply with the requirements of one-man, one-vote, separate county representation and a 150-member Assembly.

Under a system of fractional voting, in which the Assemblymen from less populous Assembly districts would receive only a fraction of one vote in the Assembly, it would be mathematically possible to comply with all three requirements. In fact, by means of fractional voting Plans C and D both comply with the one-man, one-vote requirement and the separate county representation requirement; and while

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*These three documents are included in the record on appeal to this Court in *Lomenzo* v. *WMCA, Inc.*, October Term, 1965, No. 81, commencing at pages 439, 653 and 585, respectively, of that record.

Plan D provides for 174 whole and fractional vote Assemblymen, their combined vote is only 150. However, the fractional voting provisions of both of these Plans were invalidated by the District Court, as violative of the Fourteenth Amendment, in *Lomenzo* v. *WMCA, Inc.*, 238 F. Supp. 916, 923-924 (S. D. N. Y. February 1965). Thus, unless and until the appeal to this Court (October Term, 1965, No. 81) from that District Court decision is granted and the decision reversed, fractional voting is not available to the New York Legislature in reapportioning the State, and it would not appear to be available even on a temporary basis in the absence of further relief through some new order of the District Court.

END